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In the Supreme Court

OF THE

United States

OCTOBER TERM 1945

No. 1113

COUNTY OF MARIN, STATE OF CALIFORNIA,
Petitioner,

vs.

JAMES S. PEDROTTI, also known as STEPHEN PEDROTTI, MARLYN PEDROTTI, MRS. ANGIE MINER, now known as ANGIE BOLTZ, MRS. RUBY BRIEN, MRS. KATHERINE COBB, SAM PEDROTTI, MRS. EUNICE BAUCHERO, MRS. JULIA ESTELLE BEAUREGARD, MRS. MAE GHISLETTO, RALPH PEDROTTI, MRS. BEATRICE M. CAPUCETTI, MRS. ERNESTINE B. PRONINI, GUSSIE K. PEDROTTI, now known as GUSSIE K. GRAHAM, MRS. SANTINA CERINI, MRS. SAVINA CERINI, MRS. EVA PEDROTTI and MARTIN PEDROTTI,
Respondents.

PETITION FOR WRIT OF CERTIORARI

to the Circuit Court of Appeals for the Ninth Circuit

and

BRIEF IN SUPPORT.

CARLOS R. FREITAS,
Counsel for Petitioner.

A. E. BAGSHAW,
District Attorney,
Marin County, California,
Of Counsel.

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Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner, the COUNTY OF MARIN, a political subdivision of the State of California, respectfully prays that a writ of certiorari issue to review the judgment of the United States

Circuit Court of Appeals for the Ninth Circuit (R. 293), entered January 10, 1946 (rehearing denied February 26, 1946), (R. 301), in an action numbered and entitled on its docket, No. 10,864, JAMES S. PEDROTTI, et al., Appellants, vs. *County of Marin, State of California,* Appellee, reversing the judgment of the United States District Court for the Northern District of California, Southern Division, (R. 62), in favor of the petitioner for the sum of $41,523.00, this being the sum deposited in the Registry of the Court by the United States of America as just compensation for the taking, by the United States of America, under the power of eminent domain, of certain lands, title to which was claimed by the petitioner.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

On November 9, 1933, Matthias Joseph Pedrotti, a resident of the County of Marin, State of California, died leaving a will which contained the following provision (R. 98):

> "I give, devise and bequeath my home ranch at Ignacio, Marin County, California, commonly known as the Pedrotti ranch, containing 263 acres of land more or less, to the County of Marin. Said ranch shall be kept by said County of Marin, and the net income derived therefrom shall be used by said County of Marin for the aid and relief of crippled and blind bona fide residents of the County of Marin, who are in need. Said County of Marin shall at no time sell or mortgage said property, or attempt to sell or mortgage the same, and in the event that said County of Marin should attempt to sell or mortgage or sell or mortgage the said property, then it shall forfeit all rights to said property, and said property shall forthwith revert to and become the property of my heirs at law, according to the laws of succession of the State of California.

> "This gift to said County of Marin is given in memory of my deceased wife, Henrietta G. Pedrotti, and said ranch shall, upon its distribution to said County of Marin, be known as, and called the Henrietta G. Pedrotti Memorial Farm."

In accordance with this devise the ranch was distributed to Marin County which accepted it under the terms of the will; setting the income up in a special fund called the "Pedrotti Memorial Fund" and using it for the purposes provided in the will. No attempt to sell or mortgage the property was made by the County of Marin and it continued to comply with the provision of the will until May 21, 1942, on which date the United States of America filed its complaint in condemnation (R. 2) and declaration of taking of the property (R. 8), alleging that said lands were necessary to provide for the extension of Hamilton Field, a military air field.

The complaint and declaration of taking were filed in the United States District Court for the Northern District of California, Southern Division and there was deposited in the Registry of the Court $43,550.00, the estimated just compensation for the taking of the property. Only the County of Marin was named other than fictitiously as a party defendant in the original proceedings. However, on July 19th, 1943, the seventeen persons named as respondents herein appeared and answered (R. 18) as defendants designated in the complaint by fictitious names, alleging that they were the heirs at law of MATTHIAS JOSEPH PEDROTTI, deceased; that by his will he had created an express trust; that the purposes for which that trust had been created had ceased and that the estate of the County of Marin had likewise ceased in that the taking of the property by the United States of America had destroyed the purpose of

said trust, towit: the creation of a memorial to the deceased wife of the testator.

For a further, separate and distinct answer, they alleged that the County of Marin, as trustee, had sold or attempted to sell the property in question, contrary to the express provisions of the trust, and had thereby forfeited its title to the property. Hence they prayed that the entire compensation for the taking of the property be awarded to them.

In the trial court the defendants stipulated and agreed to the payment of $2,027.00 to one M. S. Amaral for his leasehold interest in the property. The question before the District Court and before the Circuit Court was whether the remaining $41,523.00 should be paid to the County of Marin or to the heirs of the decedent Pedrotti.

OPINION BELOW.

The opinion of the District Court (R. 46) is not reported. Briefly, it was therein concluded:

(a) That, while condemnation will be deemed a "sale" for certain limited purposes, the testator Pedrotti did not intend to include condemnation in the term "sale".

(b) That the preservation of the ranch as a memorial was not such an essential object of the trust that its impossibility would cause the trust to fail; that, by means of the cy pres doctrine, the County of Marin could apply the condemnation award to a closely allied purpose by investing the award in a memorial fund to be used for the aid of the County's needy crippled and blind.

(c) That the entire compensation should be awarded to the County of Marin.

The opinion of the Circuit Court of Appeals (R. 294) is not yet reported. Briefly, it was therein concluded:

(a) That the testator Pedrotti intended the word "sale" to be synonymous with the word "convey" and to include a taking by condemnation.

(b) That the testator's primary purpose was to preserve the home ranch as a perpetual memorial to his deceased wife, and the charitable purpose was but secondary and incidental; that the primary purpose having become impossible of fulfillment, the trust must fail and the cy pres doctrine was not applicable.

(c) That the entire compensation be awarded to the heirs at law of testator Pedrotti.

STATEMENT OF BASIS OF JURISDICTION.

The judgment of the Circuit Court of Appeals was entered January 10, 1946 (R. 293). Rehearing was denied February 26, 1946 (R. 30!).

The three months period for filing this petition begins to run from February 26th, 1946. Jurisdiction of this court is invoked under Act of February 13, 1925, Ch. 229, Sec. 1, 43 Stat. 938, as amended, Judicial Code, Sec. 240(a), U. S. C. Title 28, Sec. 347(a).

Jurisdiction was conferred on the District Court by Section 24, One, of the Judicial Code, as amended, and by Act of August 1, 1888, Ch. 728, Sections 1 and 2, 25 Stat. 357, as amended, U. S. C. Title 28, Sections 257 and 258, and by Act of February 26, 1931, Ch. 307, Sec. 1, 46 Stat. 1421, U. S. C. Title 28, Sec. 258 (a).

Its judgment was entered May 29, 1944 (R. 62). Within three months, and on August 4, 1944, notice of appeal was filed (R. 69), pursuant to Section 128 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED.

Whether the Circuit Court of Appeals erred:

1. In holding that the respondents at the time of the taking, had an interest in the property of a compensable value;

2. In holding that the testator Pedrotti intended the word "sale" as used in his will to include a taking under the power of eminent domain;

3. In holding that the cy pres doctrine could not be applied to the facts found to exist and the trust thus preserved.

4. In holding that the petitioner is not entitled to recover the $41,523 deposited in the Registry of the Court and agreed by all parties to be just compensation for the taking, after the payment of a stipulated sum to the tenant in possession.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

1. The decision of the Circuit Court, insofar as it holds that, at the time of the taking of the property under eminent domain, the respondents had an interest in the property of a compensable value, ignores, but is directly contrary to the following decisions, in all of which it has been held that when property is granted subject to a condition the occurrence of which will cause a reversion, unless the termination of the determinable estate is imminent for reasons other than condemna-

tion, the possibility of reverter has no compensable value in a condemnation proceeding, and the award should be granted the holder of the fee.

Romero v. Dept. of Public Works, 17 Cal. (2d) 189;

People of Puerto Rico v. United States, 1 Circ. 132 Fed. (2d) 220; cert. den. 319 U. S. 752, 63 S. C. 1165;

Lutes v. Louisville & Nashville R. R. Co. 158 Ky. 259 164 S. W. 792;

Lyford v. City of Laconia 75 N. H. 220; 72 Atl. 1085;

United States v. 16 acres of land, etc., (D. Ct. Mass.) 47 Fed. Supp. 603;

United States v. 1119.15 acres of land (D. Ct. E. D. of Ill.) 44 Fed. Supp. 449;

2. The decision of the Circuit Court, insofar as it holds that the testator intended the term "sale" as used in his will to be synonymous with "convey" and to include a taking under eminent domain, ignores, but is directly contrary to *State v. Federal Square Corporation,* 89 N. H. 538; 3 Atl. (2d) 109, and misconceives, and so is directly contrary to the following decisions:

Iowa v. McFarland (Five per cent cases) 110 U. S. 471;

Hawaiian Gas Products v. Commissioner of Internal Revenue, 9 Circ. 126 Fed. (2d) 4, cert. den. 317 U. S. 653;

Commissioner of Internal Revenue v. Kieselbach, 3 Circ. 127 Fed. (2d) 359;

United States v. Certain Parcels of Land in Loyalstock Tp. etc. (D. Ct. M. D. of Penn.) 51 F. Supp. 811;

American Creameries Co. v. Armour (Wash.) 271 Pac. 896;

3. The decision of the Circuit Court, insofar as it holds that the cy pres doctrine could not be applied to the facts found to

exist, and the trust thereby preserved, ignores, but is directly contrary to the following decisions:

State Vs. Federal Square Corporation, supra,
In re Wilkey's Estate, 337 Penn. 129, 10 Atl. (2d) 425;

WHEREFORE, your petitioner prays that a writ of certiorari issue out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that court to certify and send to this court, for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and of all proceedings in said case numbered on its docket 10,864, that the judgment of said Circuit Court be reversed, and that petitioner have such other and further relief in the premises as to this court may seem proper.

CARLOS R. FREITAS,
Counsel for Petitioner.

A. E. BAGSHAW,
District Attorney,
Marin County, California,
Of Counsel.

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Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION OF THE COURT BELOW.

A reference to the official report of the opinion of the Circuit Court of Appeals (R. 294) is set forth in the petition, (p. 4). That reference is adopted here.

II.

STATEMENT OF JURISDICTION.

A concise statement of the grounds on which the jurisdiction of this court is invoked is given in the petition (p. 5), and, by reference thereto, is adopted here.

III.

CONCISE STATEMENT OF THE CASE.

A summary of the matter involved is given in the petition (p. 2). To avoid duplication, that statement is incorporated herein as a concise statement of the case.

IV.

SPECIFICATION OF ERRORS.

The errors intended to be urged are those specified in the petition as the questions presented and numbered 1-4, (p. 4), all of which are specifically assigned as error.

V.

SUMMARY OF ARGUMENT.

1. The Circuit Court of Appeals erred in holding that the respondents, at the time of the taking by condemnation, had an interest in the property of a compensable value.

2. The Circuit Court of Appeals erred in holding that the testator intended the word "sale" to be synonymous with "convey" and to include a taking by condemnation.

3. The Circuit Court erred in holding that the *cy pres* doctrine could not be applied to the facts found to exist and the trust be thus preserved.

4. The Circuit Court erred in holding that the respondents, and not the petitioner, were entitled to receive the condemnation award.

ARGUMENT.

I.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT THE RESPONDENTS AT THE TIME OF THE TAKING BY CONDEMNATION, HAD AN INTEREST IN THE PROPERTY OF A COMPENSABLE VALUE.

Attention is called to the fact that, at the time of the filing of the complaint for condemnation and the declaration of taking, the fee title to the property was in the petitioner, *County of Marin,* and the respondents (Pedrotti heirs) had no interest in the property other than a possibility of reverter in the event the petitioner should sell or mortgage, or attempt to sell or mortgage, the property.

QUERY: *Was that possibility of reverter an estate of compensable value?* The trial court concluded that it was not (R. 46). The Circuit Court concluded that it was (R. 293); in fact that it had a compensable value equal to the value of the fee title. In this the Circuit Court erred.

The rule is well stated in the *American Law Institute, Restatement of the Law of Property,* Section 53, Comment b (page 604, 47 Fed. Supp.,) as follows:

> "If, viewed from the time of the commencement of an eminent domain proceeding, and not taking into account

> any changes in the use of the land sought to be condemned which may result as a consequence of such proceeding, the event upon which a possessory estate in fee simple defeasible is to end is an event the occurrence of which, within a reasonably short period of time, is not probable, then the damages for a taking thereof by an eminent domain proceeding are ascertained as though the estate were a possessory estate in fee simple absolute and the entire amount thereof is awarded to the owner of the estate in fee simple defeasible. Under these circumstances the future interest has no ascertainable value. *It is immaterial whether the event upon which the possessory estate in fee simple defeasible is to end is related to the use of the land in question or is unrelated thereto.*"

This rule has received uncontradicted application in Courts of Appeal, both state and federal. Thus in *Romero Vs. Department of Public Works,* 17 Cal. (2d) 189, (Supreme Court, Calif.) certain lands had been conveyed to a railroad company for one dollar, plus benefits to be derived from the construction and operation of a railroad, the deed containing a condition that the land should be used only for railroad purposes and in the event the railroad company should fail to use it for railroad purposes, the land to revert to the heirs of the grantor. The railroad company used the land for railroad purposes for forty years. Then the State of California condemned sixty feet of the right of way for highway purposes and the question arose as to who was entitled to the award. The California Supreme Court, in holding that the railroad company and not the heirs of the grantor were entitled to the award, said:

> "When the state in the condemnation proceeding acquired the title to the 60 foot strip for highway purposes it thereby prevented its use for railroad purposes. As to so much of said property, the condition that it should be used

for railroad purposes became impossible of further performance by operation of law. In other words, the public necessity for highway purposes as to that portion which was conclusively established in the condemnation proceeding, prevented further performance of the condition. *The authorities generally are to the effect that the owner of the possibility of a reverter prior to a breach of the condition is not entitled to compensation when the property is taken under the law of eminent domain. Such cases hold that the possibility of voluntary abandonment by non-user is so remote and improbable that it has no substantial value to be estimated in a condemnation proceeding.* They recognize, however, that the owner of the fee or the reversionary interest should have a separate valuation of his interest where the land taken has some special value to him, as where the underlying lands are shown to be mineral bearing or otherwise of value separately from the use of the surface of the land; but that otherwise the law will not take notice of the separate value of the fee and of the user where there is no substantial difference in their values, and *if, in such case, at the time fixed for the valuation the reversion has not occurred, the reversionary interest is said not to have any compensable value in a condemnation proceeding. (Southern Pac. R. Co. v. San Francisco Sav. Union,* 146 Cal. 290 (79 Pac. 961, 106 Am. St. Rep. 36, 2 Ann Cas. 962, 70 L. R. A. 221); *City of San Gabriel v. Pacific Elec. Ry. Co.,* 129 Cal. App. 460 (18 Pac. (2d) 996); *Lutes v. Louisville & Nashville Railroad Co.,* 158 Ky. 259 (164 S. W. 792); *Nichols, Eminent Domain,* 2d. ed., vol. 1, p. 243; *see, also, Lyford v. City of Laconia,* 75 N. H. 220 (72 Atl. 1085, 139 Am. St. Rep. 680, 22 L. R. A. (N. S.) 1062)." (Underscoring ours).

The same rule was applied in *U. S. vs. 16 acres of land (Dist. Ct. Mass.)* 47 Fed. Supp. 603, where the testator devised land to a city for park purposes, with a proviso for reverter should the

city use the land "for other than park purposes" and the United States thereafter took the property in condemnation proceedings.

The rule was also applied in *U. S. vs. 1119.15 acres of land (Dist. Ct. E. D. of Ill.)* 44 Fed. Supp. 449, where land was deeded to school trustees for school purposes with a proviso for reverter in the event it was otherwise used and the land was thereafter condemned by the United States.

The rule was also applied in *People of Puerto Rico Vs. United States, et al.,* (1 Circ.) 132, Fed. (2d) 220, cert. den. 319 U. S. 752; 63 S. C. 1165. There the People of Puerto Rico, ceded certain public lands to the Casino de Puerto Rico, a local corporation, upon condition that they would be "used only for non profit purposes; as a social center and recreation park annexed thereto" and with a provision for reversion if used for other purposes. Thereafter the United States condemned the property and deposited its value, $135,000, in the Registry of the Court. The People of Puerto Rico claimed the award, as did the Casino corporation. The District Court granted the award to the corporation and the Circuit Court 1 Circ. affirmed that decision and in its opinion stated:

> "The sole question before us is whether or not the People of Puerto Rico, at the time of the taking, also had a compensable interest in the property, which interest the taking damaged or destroyed. Undoubtedly the People of Puerto Rico had an interest in the land in question at the time of its condemnation. Whether that interest was a right of re-entry for condition broken, or a conditional reversion, or a possibility of reverter, or something else, we need not inquire, because, whatever its technical name, the only right which the People had up to the time when the land was condemned was the right to the land in fee simple if at some indefinite time in the future the

Casino should violate any one of the conditions or provisos upon which its right of present occupancy was made to depend. And this right of the People of Puerto Rico was destroyed by the condemnation. But, the question remains: What was the value of that right?"

"We are aware of no rational means by which to determine the value of the possibility that at some indefinite time in the future the land might revert to the People of Puerto Rico. All that can be done is to venture a guess, and it is elementary law that damages cannot be assessed by mere guesswork. In Lyford v. Laconia, 75 N. H. 220, 226, 72 A. 1085, 1089, 22 L. R. A., N. S., 1062, 139 Am. St. Rep. 680, the court said in speaking of a similar interest that 'There was no method by which the value of the interest could be assessed which would rise above the dignity of a guess', and in Chandler v. Jamaica P. A. Corporation, 125 Mass. 544, 547, it was said that the 'possibility of interest is too remote and contingent to be the subject of an estimate of damages by a jury'. See, also, First Reformed Dutch Church v. Croswell, 210 App. Div. 294, 206 N. Y. S. 132; Joint School District No. 1, Town of Greenfield v. Bosch, 219 Wis. 181, 262 N. W. 618; United States v. 1119.15 acres of land, D. C., 44 F. Supp. 449; United States v. 2,086 Acres of Land, D. C., 46 F. Supp. 411; and also 1 Am. Law Inst. Restatement of Property § 53, comment (b) and illustrations thereunder.

"The cases cited above are all in accord and are all squarely in point. We believe their reasoning to be sound. If Lancaster School District v. Lancaster, 295 Pa. 112, 144 A. 901, (see 29 Columbia Law Review 674), relied upon by the appellant, holds to the contrary we decline to follow it.

"The judgment of the District Court is affirmed."

The rule has been also followed, although on different facts,

in *Beard's Erie Basin, Inc., vs. People of New York,* 2 Circ. 142 Fed. (2d) 487.

In the case at bar, there is no evidence whatsoever from which even an inference could be drawn that the County of Marin intended to sell or mortgage, or to attempt to sell or mortgage the property in question had it not been condemned. Hence the reversionary interest of the heirs of the testator was so remote and uncertain that it had no compensable value and the Circuit Court erred in awarding the respondents the full value of the fee.

No reason has been suggested, and none appears in the opinion of the Circuit Court, why this well established rule is not applicable to the instant case. In fact the Circuit Court entirely ignored it, although the issue was raised both by supplemental briefs and by petition for rehearing.

It is respectfully urged that the decision of the Circuit Court, 9 Circ. in the case at bar is contrary to and in conflict with decisions of the Circuit Courts of Appeal, First Circuit and Second Circuit and Courts of Appeal of the States of California, Kentucky, New Hampshire, Massachusetts, New York and Wisconsin, and hence that the application for a writ of certiorari should be allowed.

II.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT THE TESTATOR INTENDED THE WORD "SALE" TO BE SYNONYMOUS WITH "CONVEY" AND TO INCLUDE A TAKING BY CONDEMNATION.

In its opinion, the Circuit Court concludes:

"There is ample authority for appellants' contention that a transfer of property by eminent domain is a 'sale'."

This unqualified conclusion permits of but one interpretation, viz: that the Circuit Court concluded and held that a taking by condemnation is a "sale" for all purposes, in the legal as well as in the ordinary sense.

> "A sale, in legal nomenclature, is a term of precise legal import, both at law and in equity, and has a well defined legal signification, and has been said to mean, at all times, *a contract between parties* to give and to pass rights of property for money, which the buyer pays or promises to pay to the seller for the thing bought or sold."
>
> 55 C. J. 36 Sec. 1
>
> "A sale of goods is an *agreement* whereby the seller transfers the property in goods to the buyer for a consideration called the price."
>
> *Uniform Sale Act, Sec. 1, Sub.* 2.

That "sale", both in its legal and in its ordinary sense means a *contract*, or a meeting of the minds, is so fundamental as to require no extensive citation of authorities. And there exists in a condemnation proceeding no element of contract and no meeting of minds. In fact, if a contract or meeting of minds is possible, no condemnation is necessary because the public agency purchases the property at the agreed price. In truth and in fact a condemnation is a taking or appropriation of property by a sovereign power, for public use and without the owner's consent.

Scott Vs. Toledo, (C C) 36 Fed. 385.

True, as stated by the Circuit Court, there is ample authority that a transfer of property by eminent domain is a "sale", or

will be deemed such but only for limited purposes and when consistent with intent of the user of the term and no injust results therefrom. The Circuit Court, in its opinion, (R. 299) cites a number of decisions wherein it has been so held. A review of those authorities herein would appear to be of little value inasmuch as they throw no light on the intention of the testator, which must control.

That the testator did not intend the word "sale" to include a taking by eminent domain is clearly apparent from the following observations:

(a) The will (R. 98) was dated August 24th, 1929, before Hamilton Field, a military airport, was conceived or constructed. The land involved was a 263 acre dairy ranch, isolated from residential or industrial development. To contend that the deceased foresaw the possibility that thirteen years thereafter this nation would be engaged in a great war and would be condemning ranch acreage, including his own, for the construction of numerous air fields, would be to attribute to him supernatural powers.

(b) If the testator intended "sale" to include a taking by condemnation, he would not have made provision for the reversion *of the land* to his heirs in the event of "sale" or "attempted sale". For such a reversion became impossible after condemnation.

(c) If the testator intended "sale" to include condemnation, he would have made provision for the disposition of the condemnation award.

(d) If the testator intended to provide for a reversion in the event of condemnation, he could have so stated by the use of simple language.

The Circuit Court apparently recognized that the testator never contemplated a taking of the property by condemnation, for in its opinion it states:

> "We think the testator meant 'convey' and that he used the term 'sale' or 'mortgage' because at the time of making his will a 'sale' or 'mortgage' was the conceivable means by which the county might dispose of the property."

The Circuit Court, concluded that the primary purpose of the testator was to preserve his home ranch as a memorial to his deceased wife and that the creation of the charitable trust was but incidental, and must fail because the primary purpose had become impossible of fulfillment. Upon what evidence that conclusion was reached does not appear. There is no evidence whatsoever in the record tending to disclose the intent of the testator other than the will itself. The terms of the will are as consistent with the conclusion that the testator intended primarily to create a trust for the benefit of the blind and crippled who were *bona fide residents of the County of Marin*, the community where he had long resided and prospered considerably, and that it was a mere incident that his home ranch was available as the corpus of the trust and that he saw fit to create the trust in memoriam of his deceased wife.

Assuming, as concluded by the Circuit Court, that the testator did intend "sale" to mean "convey", it does not follow that the taking by condemnation was sufficient to cause a reversion to the Pedrotti heirs.

For the will provided (R. 98) that:

> " . . . in the event *that the said County of Marin should sell*. . . . then it shall forfeit all rights to said property, and said property shall revert, etc."

It required the County of Marin to become an affirmative actor, to "sell" or to "convey" before a forfeiture would be worked and a reversion result. And the uncontradicted evidence is, and the trial court found (R. 58) that the County of Marin played a negative part in the condemnation proceedings. If the condemnation was a sale, it was a sale by operation of law and not by the County of Marin.

The decision of the Circuit Court in this regard is in direct conflict with *State Vs. Federal Square Corporation,* 89 N. H. 538, 3 Atl. (2d) 109 which is fully discussed herein in Argument III.

And so too, if the testator intended "sale" to mean "convey", still he specifically prohibited a conveyance only by the County of Marin, and in the condemnation proceedings the County did not convey. That too was done by operation of law.

III.

THE CIRCUIT COURT ERRED IN HOLDING THAT THE CY PRES DOCTRINE COULD NOT BE APPLIED TO THE FACTS FOUND TO EXIST AND THE TRUST BE THUS PRESERVED.

In its opinion the Circuit Court states:

> "We have no quarrel with the principle of cy pres to continue the charity in the next best way if the precise method prescribed becomes impossible of fulfillment – if the intent of the testator were clear and as interpreted by the lower court. That is, if it were clear from the will that the intention of the testator was that his property should be applied to a charitable purpose *in any event,* we could apply the cy pres doctrine in order that such general charitable intent not be defeated. However, here it is

not clear that the testator intended to create a general charitable trust."

A decision very similar in facts and very much in point is *State v. Federal Square Corporation,* supra. Briefly, the facts there were that one Fowler deeded to the City of Concord certain lands, together with the buildings thereon and the furnishings therein, to be used as a free public library. The grant provided not only for the specific use of the land and buildings, but also that certain rooms therein should be given specific names and used for specific purposes, and that over specified doors there was to be inscribed:

> *"This building was presented to the City of Concord, October 18, 1888, by William P. Fowler and Clara M. Fowler, in grateful and loving remembrance of their parents, Asa Fowler and Mary C. K. Fowler, for fifty years residents of Concord, and always active promoters of the educational and intellectual advancement of its citizens,"* and *"The Fowler Library Building".*

The deed further provided that in the event the land or building were ever used for any other purpose, or if any other conditions were broken, the property was to revert to the grantor's heirs.

The premises were accepted by the City and used as directed until the State of New Hampshire condemned them for the erection of a state house.

The heirs of the donor contended a reversion had occurred and claimed the award. The trial court applied the cy pres doctrine and directed that the entire award be paid to the City, in trust for library purposes, and the heirs appealed.

The Supreme Court of New Hampshire sustained the trial court, holding that the donor intended a reversion to result,

only if the city, *voluntarily* used the property for other than library purposes and that the cy pres doctrine should be applied to preserve the trust for purposes as nearly consistent with the intent of the donor as was possible.

The facts in *State vs. Federal Square Corporation, supra* are so identical and the entire opinion is so applicable to the case at bar, that a partial quotation from the decision would be inadequate. Rather than quote the entire opinion herein, the same is called to the Court's attention in confidence that it will be given thorough consideration.

The Court's attention is also called to the case of *In re Wilkey's Estate*, 337 Penn. 129, 10 Atl. (2d) 425, which is equally compelling to the conclusion that the condemnation of the land devised should not result in a reversion of the award to the heirs and that the cy pres doctrine should be applied to preserve the trust. Briefly, the facts were that the testator bequeathed the residue of her estate to the Presbyterian Church, for the specific purpose of building a church on the land "which has been the home of my family for generations", the church to be known as the "Wilkey Memorial Presbyterian Church". The will directed the type of architecture to be followed in the construction of the church, and that certain stone taken from the family farm house should be worked into the new structure; also that the entire plot be used for a church and the dwelling next door as a manse for the use of the pastors.

Shortly after the death of the testatrix and before her wishes could be carried out, the land was taken by eminent domain for school purposes. The heirs of the testatrix claimed the award but the trial court awarded it to the church trustees, to be used for the erection of a church at a location about seven city squares removed from the location designated by the testatrix, the

church to be known by the same name. The heirs appealed and the Supreme Court of Pennsylvania sustained the trial court, stating:

> " . . . . In applying the principle of cy pres the court does not arbitrarily substitute its own judgment for the desire of the testator, or supply a fictional testamentary intent, but, on the contrary, it seeks to ascertain and carry out as nearly as may be the testator's true intention; in so doing it assumes that where a particular purpose is apparently not an essential feature of his plan, the testator would prefer that his property should be applied to a purpose as similar as possible to that stated by him rather than that the trust which he attempted to create should fail altogether. Perhaps the best enunciation of the doctrine is that contained in Restatement, Trusts, section 399: 'If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settler manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settler.' Or, as tersely stated in City of Philadelphia v. Heirs of Stephen Girard, 45 Pa. 9, 27, 28: 'The rule of equity on this subject seems to be clear, that when a definite charity is created, the failure of the particular mode in which it is to be effectuated does not destroy the charity, for equity will substitute another mode, so that the substantial intention shall not depend on the insufficiency of the formal intention.'
>
> "Cases are not infrequent in which the physical location of the edifice or institution provided for in a charitable trust has been held to be of secondary importance in comparison with the general purpose for which the erection

> of the building or the carrying on of the charitable activity was designed. Illustrations in our own state are: Avery v. Home for Orphans of Odd Fellows of Pennsylvania, 228 Pa. 58, 77 A. 241; In re Kramph's Estate, 228 Pa. 445, 461-463, 77 A. 814; In re Mear's Estate, 299 Pa. 217, 149 A. 157; In re Curran's Estate, 310 Pa. 434, 165 A. 842."

The decision of the Circuit Court in the case at bar is in direct conflict with the decision of the Supreme Court of New Hampshire in *State Vs. Federal Square Corporation,* supra, and the decision of the Supreme Court of Pennsylvania in *In re Wilkey's Estate, supra,* yet the Circuit Court made no attempt to reconcile its decision with those cases, although they had been cited and extensively quoted in the briefs.

The Circuit Court, in its opinion (R. 297) did conclude that the primary purpose of the testator was to preserve his home ranch as a memorial to his wife, and hence the *cy pres* doctrine could not be applied. Can it be said that the donor in *State vs. Federal Square Corporation, supra,* had any less purpose of preserving the building he designed, furnished and donated in memory of his deceased parents; or that the testatrix in *In re Wilkey's Estate,* supra, had a less purpose of preserving the property which had been her family home for generations (since the days of William Penn as stated by the court) as a memorial to herself? In both the two cited cases and in the case at bar, the grantor or testator intended to accomplish three purposes, viz: (1) The preservation of specific property, (2) as a memorial, and (3) for specific charitable purposes. In each instance the fulfillment of all three purposes became impossible because of the condemnation of the property. In the two cited cases the courts wisely and justly applied the cy pres doctrine to give effect to two of the purposes, viz: the creation

of a memorial and for benefit of the specified charity. The same result will be accomplished in the case at bar if the decision of the trial court is affirmed. A Henrietta Pedrotti Memorial Fund will be created and the income from that fund will be used for the aid of the crippled and blind needy residents of Marin County. Only the preservation of the home ranch has become impossible and need fail.

On the other hand, if the decision of the Circuit Court is permitted to stand, all three purposes must fail. There will be no preservation of the home ranch, no memorial to the deceased wife and no charitable trust. Rather, there will result an unintended and inequitable windfall to the respondents, all of whom are nephews and nieces of the testator (R. 96).

IV.

THE CIRCUIT COURT ERRED IN HOLDING THAT THE RESPONDENTS AND NOT THE PETITIONER, WERE ENTITLED TO RECEIVE THE CONDEMNATION AWARD.

(a) The decision of the Circuit Court insofar as it held that the respondents had a compensable interest in the property at the time it was taken by condemnation is in direct conflict with *Romero Vs. Department of Public Works, supra, People of Puerto Rico vs. United States, supra,* and related cases cited in this brief.

(b) The decision of the Circuit Court, insofar as it holds that the testator intended the word "sale" to include a taking by condemnation, is in conflict with *State Vs. Federal Square Corporation, supra,* and is wholly unsupported by the evidence.

(c) The decision of the Circuit Court, insofar as it holds that the cy pres doctrine may not be applied to preserve the

trust created by the testator, is in conflict with *State Vs. Federal Square Corporation, supra,* and *In re Wilkey's Estate, supra.*

Petitioner respectfully urges that a writ of certiorari be issued.

Respectfully submitted,

CARLOS R. FREITAS,
Counsel for Petitioner.

A. E. BAGSHAW,
District Attorney,
Marin County, California,
Of Counsel.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1945

No. 1113

COUNTY OF MARIN, STATE OF CALIFORNIA,
Petitioner,

vs.

JAMES S. PEDROTTI, also known as Stephen Pedrotti, MARLYN PEDROTTI, MRS. ANGIE MINER, now known as Angie Boltz, MRS. RUBY BRIEN, MRS. KATHERINE COBB, SAM PEDROTTI, MRS. EUNICE BAUCHERO, MRS. JULIA ESTELLE BEAUREGARD, MRS. MAE GHISLETTO, RALPH PEDROTTI, MRS. BEATRICE M. CAPUCETTI, MRS. ERNESTINE B. PRONINI, GUSSIE K. PEDROTTI, now known as Gussie K. Graham, MRS. SANTINA CERINI, MRS. SAVINA CERINI, MRS. EVA PEDROTTI and MARTIN PEDROTTI,
Respondents.

Upon Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

(NOTE): Italics throughout is that of respondents.

OPINION BELOW.

The opinion of the District Court of the United States for the Northern District of California, is reported in 54 F. Supp. 692.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit is reported in 152 F. (2d) 829.

STATEMENT OF THE CASE.

On November 9, 1933, Matthias Joseph Pedrotti died, leaving a will which contained the following provision:

> "8. I give, devise and bequeath my home ranch at Ignacio, Marin County, California, commonly known as the Pedrotti Ranch, containing 263 acres of land more or less, to the County of Marin. Said ranch shall be kept by said County of Marin, and the net income derived therefrom shall be used by said County of Marin for the aid and relief of crippled and blind bona fide residents of the County of Marin, who are in need. Said County of Marin shall at no time sell or mortgage said property, or attempt to sell or mortgage the same, and in the event that said County of Marin should sell or mortgage the said property, or attempt to sell or mortgage said property, then it shall forfeit all rights to said property, and said property shall forthwith revert to, and become the property of my heirs at law according to the laws of succession of the State of California.
>
> "This gift to said County of Marin is given in memory of my deceased wife, Henrietta G. Ped-

rotti, and said ranch shall upon its distribution to said County of Marin, be known as, and called the 'Henrietta G. Pedrotti Memorial Farm.' "
(R. 100.)

The last will and testament of the above-named deceased was duly and regularly admitted to probate by the Superior Court of the State of California, in and for the County of Marin, and thereafter, and on or about the 28th day of December, 1934, said Superior Court by its order duly given and made, distributed said real property to the County of Marin in trust, according to the terms and provisions of the last will and testament of said decedent. (R. 90-95.)

Pursuant to said order of distribution the County of Marin took possession of said Pedrotti Ranch, containing 263 acres of land more or less, and held the same until the conveyance thereof to the United States of America under condemnation proceedings. (R. 66.)

The compensation paid into the registry of the Court below for said property so sold was $43,550.00, which all parties to the condemnation proceedings stipulated was full, adequate and just compensation therefor. (R. 38.)

The defendants in the condemnation proceedings were the County of Marin and the heirs of the decedent Pedrotti.

The defendants in the condemnation proceedings further stipulated to the payment of $2027.00 to one M. S. Amaral for his leasehold interest in the prop-

erty. (R. 43.) The question before the District Court and before the Circuit Court of Appeals was whether the remaining $41,523.00 should be paid to the County of Marin or to the heirs of the decedent Pedrotti.

JURISDICTION.

The judgment of the United States Circuit Court of Appeals for the Ninth Circuit (R. 293) was entered on January 10, 1946. The petition for rehearing was denied on February 26, 1946. The mandate of the Circuit Court of Appeals was stayed until after this Court passes on the petition and disposes of the cause. The jurisdiction of this Court is sought to be invoked under Act of February 13, 1925, Ch. 229, Sec. 1, 43 Stat. 938, as amended, Judicial Code, Sec. 240(a), Title 28 U.S.C.A. Sec. 347(a).

Jurisdiction was conferred on the District Court by Section 41(1) of Title 28 U.S.C.A. and Sections 257, 258 and 258a of Title 40 U.S.C.A.

Judgment was entered in the District Court on May 29, 1944. (R. 62.) Within three months, and on August 4, 1944, notice of appeal was filed (R. 69), pursuant to Sections 225(a) and 230 of Title 28 U.S.C.A. and Rule 73 of the Federal Rules of Civil Procedure.

SUMMARY OF ARGUMENT.

The decedent Pedrotti by his last will and testament created not an estate in fee simple defeasible in the petitioner but a testamentary trust which has terminated by its terms and under the law of California.

ARGUMENT.

The title acquired by the County of Marin under the last will and testament of the decedent was not an estate in fee simple defeasible.

The decedent by his last will and testament created a testamentary trust which has terminated. Having terminated, the proceeds of the condemnation award should be paid to and "shall vest in the persons entitled thereto". (Sec. 258a of Title 40 U.S.C.A.)

At the trial of this case petitioner had difficulty in settling down to a definite position in respect to the legal questions involved in the case. It tendered to the Court the thought that the case should be resolved on the theory that the title of the County of Marin was an estate in fee simple defeasible. It abandoned this position, and thereafter faced the issues involved as they really exist.

The position of respondents had been clearly defined and has never been deviated from in any stage of the case.

This case was decided by the District Court on the basis that a trust was created and impliedly the theory

of "a possessory estate in fee simple defeasible" was rejected by the trial Court.

The trial judge in his memorandum opinion (R. 48) said:

> "The only question before the Court is the effect upon such *trust* of the condemnation proceedings."

In the findings of the trial Court (No. XII, R. 59) the Court found:

> "That the charitable purpose of said devise has not been defeated or become impossible of fulfillment by the condemnation of said property by the United States and that said purpose can still be carried out."

In the conclusions of law (R. 60, 61) the trial Court declared:

"I.

"That the will of Matthias Joseph Pedrotti created a valid charitable *trust* of the ranch therein devised for the aid and relief of the needy crippled and needy blind bona fide residents of the County of Marin.

"II.

"That said *trust* was not one of limited duration.

"III.

"That said *trust* has not terminated.

"IV.

"That the condemnation of said property by the United States of America did not cause a rever-

sion thereof to the heirs of the said Matthias Joseph Pedrotti, deceased.

"V.

"That the possibility of reverter in the heirs of said Matthias Joseph Pedrotti, deceased, has no compensable value in this condemnation proceedings.

"IV.

"That the entire compensation for the condemnation of said property in this proceeding (except that portion thereof which by stipulation was paid to M. S. Amaral for the value of his lease-hold interest) should be paid to the County of Marin *as trustee in trust* for the aid and relief of the needy crippled and needy blind bona fide residents of the County of Marin, and as a *substitute trust res* in substitution of the land condemned."

The possibility of reverter which the trial Court had in mind in its conclusion V above referred to was a future possibility of reverter in the proceeds of the sale which were awarded to the County of Marin, subject to the trust created by an application of the cy-pres doctrine (not the trust created by the will of the deceased). It was a conclusion predicated upon its previous finding and conclusion that the trust created in the will and the decree of distribution had not terminated and was consistent therewith.

The question of the division of the proceeds from a condemnation proceeding between the owner of a fee simple estate defeasible and the owner of an estate

in reversion, which is the subject matter of the determination in the authorities cited by petitioner is *not* the question involved in this case. This is obviously true. If the case was to be determined upon the theory now advanced by petitioner, the entire proceeds of the sale would go to the County of Marin, free from trust, free from obligation and free from the application of the cy-pres doctrine. It would mean, further, that if this will had specifically provided "that in the event of condemnation of the land, the County of Marin shall forfeit all right to the property and the same should forthwith revert to my heirs", the County of Marin could still take the position that this was an estate in fee simple defeasible and the estate "possibility of reverter" was not compensable.

The will of Pedrotti and the decree of distribution in his estate clearly create a trust.

The deceased by his last will and testament created a voluntary trust in real property. The failure of the deceased to use the words "trust", "in trust" or "trustee" is immaterial.

Estate of Ingram, 104 Cal. App. 1, 6, 285 P. 365;

Estate of Shaw, 198 Cal. 352, 359, 246 P. 48;

Kornbau v. Evans, 66 Cal. App. (2d) 677, 684, 152 P. (2d) 651.

All the elements of the trust prescribed by Sections 852, 863, 864, 2221 and 2222 of the Civil Code of California (see Appendix) and enumerated in the case of

Dingwell v. Seymour, 91 Cal. App. 483, 508, 267 P. 327, are present.

A trust having been created, in determining whether or not it has terminated, we look to its terms and to the basic law of California, which is set forth in the following sections of the Civil Code:

Section 864 provides as follows:

> "Author of trust may devise, etc. Notwithstanding anything contained in the last section, the author of a trust may, in its creation, prescribe to whom the real property to which the trust relates shall belong, in the event of the failure or termination of the trust, and may transfer or devise such property, subject to the execution of the trust."

(It will be noted that this section codifying the law of trusts in relation to real property is in conflict with petitioner's theory of "possessory estate in fee simple defeasible".)

Section 871 provides as follows:

> "When estate of trustee to cease. When the purpose for which an express trust was created ceases, the estate of the trustee also ceases."

Section 2279 provides as follows:

> "Trust, how extinguished. A trust is extinguished by the entire fulfillment of its object, or by such object becoming impossible or unlawful."

Thus it is the position of respondents:

(a) That all that the decedent Pedrotti created by his last will and testament was a testamentary trust

and not an estate in fee simple defeasible in the petitioner;

(b) That the primary purpose of the trust was the preservation of the home ranch as a perpetual memorial to the deceased wife of the testator;

(c) That the trust terminated for the reasons set forth in the opinion of the Circuit Court of Appeals (not only because the testator intended that a sale or conveyance resulting from condemnation should terminate the trust but also because "a trust is extinguished by the entire fulfillment of its object, or by such object becoming impossible or unlawful");

(d) That the trust having terminated the doctrine of cy-pres has no application; and

(e) That the condemnation award which has now become the corpus of the trust which has terminated should be paid to the "persons entitled thereto", the heirs of Pedrotti, the persons specifically named in his will as those to whom the trust estate should revert or pass.

CONCLUSION.

Contra to the conclusion expressed by petitioner, the respondents respectfully submit that petitioner never had an estate in fee simple defeasible, entitling it to the full award free from trust or the application of the cy-pres doctrine, but in fact merely held the property in trust; that the trust terminated, according to its terms and under the law of California, upon the

sale or conveyance of the trust res in the eminent domain proceedings; and that the substituted trust res (the award) should be paid to respondents.

For the reasons hereinabove stated it is contended by respondents that the petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit should be denied.

Dated, San Francisco, California,
May 15, 1946.

Respectfully submitted,
GREGORY, HUNT, MELVIN & FAULKNER,
HAROLD C. FAULKNER,
A. J. ZIRPOLI,
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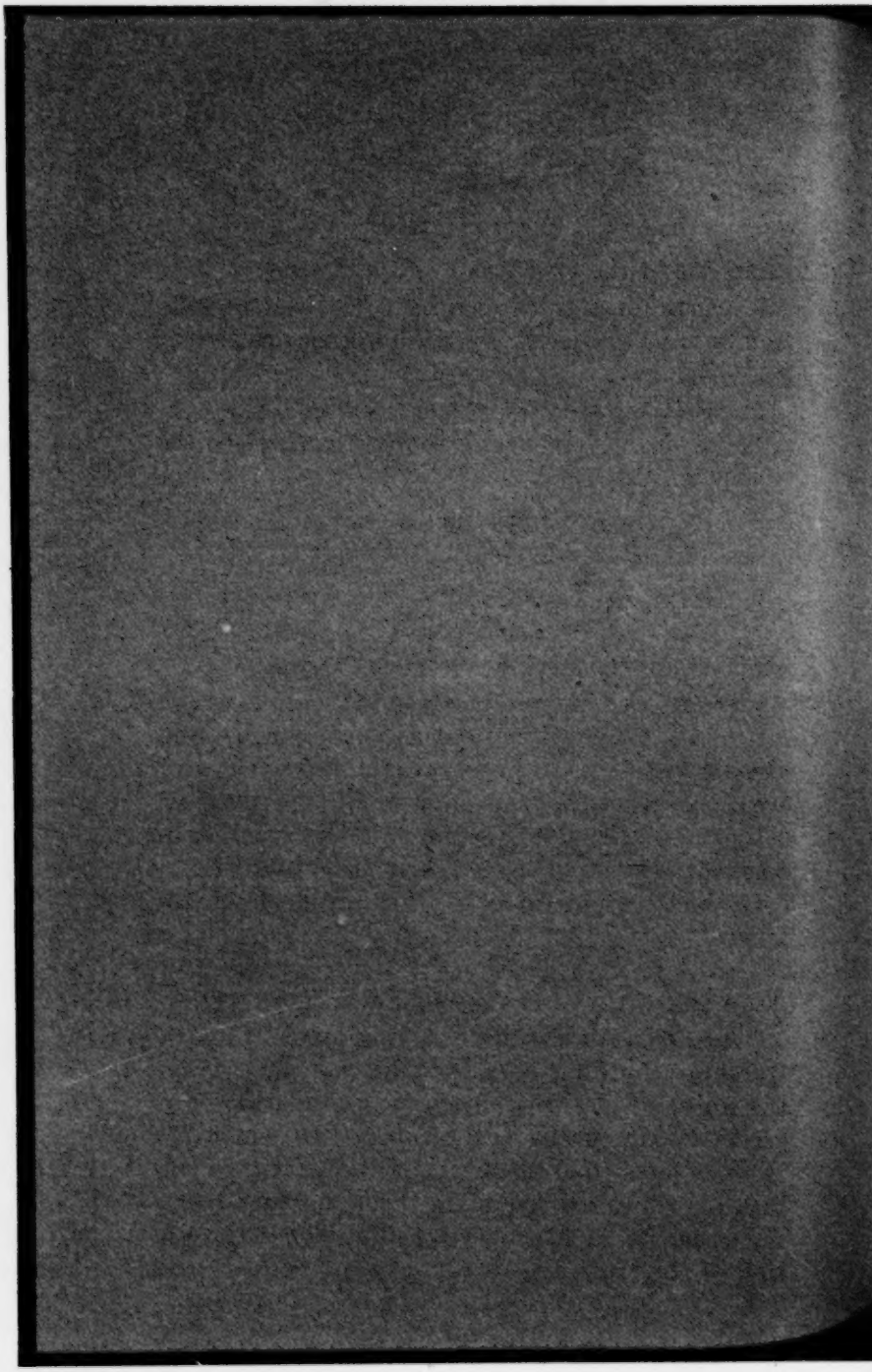
Attorneys for Respondents.

(Appendix Follows.)

Appendix.



Appendix

Section 852 of the Civil Code of California:

"Trusts must be in writing. No trust in relation to real property is valid unless created or declared:

1. By a written instrument, subscribed by the trustee, or by his agent thereto authorized by writing;

2. By the instrument under which the trustee claims the estate affected; or,

3. By operation of law."

Section 863 of the Civil Code of California:

"Trustees of express trusts to have whole estate. Except as hereinafter otherwise provided, every express trust in real property, valid as such in its creation, vests the whole estate in the trustees, subject only to the execution of the trust. The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust."

Section 864 of the Civil Code of California:

"Author of trust may devise, etc. Notwithstanding anything contained in the last section, the author of a trust may, in its creation, prescribe to whom the real property to which the trust relates shall belong, in the event of the failure or termination of the trust, and may transfer or devise such property, subject to the execution of the trust."

Section 2221 of the Civil Code of California:

"Voluntary trust, how created as to trustor. Subject to the provisions of section eight hundred and fifty-two, a voluntary trust is created, as to the trustor and beneficiary, by any words or acts of the trustor, indicating with reasonable certainty:

1. An intention on the part of the trustor to create a trust, and,

2. The subject, purpose and beneficiary of the trust."

Section 2222 of the Civil Code of California:

"How created as to trustee. Subject to the provisions of section eight hundred and fifty-two, a voluntary trust is created, as to the trustee, by any words or acts of his indicating, with reasonable certainty:

1. His acceptance of the trust, or his acknowledgment, made upon sufficient consideration, of its existence; and,

2. The subject, purpose, and beneficiary of the trust."

Section 871 of the Civil Code of California:

"When estate of trustee to cease. When the purpose for which an express trust was created ceases, the estate of the trustee also ceases."

Section 2279 of the Civil Code of California:

"Trust, how extinguished. A trust is extinguished by the entire fulfillment of its object, or by such object becoming impossible or unlawful."